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No. 94-1997

In The

# Supreme Court of the United States

October Term, 1995

THE CITY OF FT. MYERS, a chartered municipality and political subdivision of the State of Florida,

*Cross-Petitioner,*

vs.

JOHN O. ZIPPERER, JR., an individual,

*Cross-Respondent.*

On Petition For Writ Of Certiorari
To The Court Of Appeals
For The Eleventh Circuit

## BRIEF IN "OPPOSITION" TO CROSS-PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether the Tax Injunction Act, 28 U.S.C. Section 1341, bars federal jurisdiction in an action by a mortgagee challenging the super-priority accorded a special assessment lien where the assessment is not a tax under state law and the mortgagee is a holder of the subordinated lien and not a taxpayer?

## LIST OF PARTIES

The Cross-Respondent adopts herein, in its entirety, the List of Parties provided in the Cross-Petitioner's Petition.

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## OPINION BELOW

The Opinion below was reproduced in its entirety in the Petitioner/Cross-Respondent's Petition for a Writ of Certiorari. (App. A).

## STATEMENT OF JURISDICTION

The Eleventh Circuit Court of Appeals has rendered a decision in conflict with a decision of the Fifth Circuit Court of Appeals on the same matter. Pursuant to Rule 10, Rules of the Supreme Court, this Court should grant Mr. Zipperer's, the Petitioner/Cross-Respondent's, Petition for a Writ of Certiorari and the Cross-Petitioner, the City of Ft. Myers' Cross-Petition for a Writ of Certiorari.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Florida Statutes, Chapter 170 (1993) is reproduced in its entirety in the appendix (App. E) to the Petitioner/Cross-Respondent's Petition for a Writ of Certiorari.

The Tax Injunction Act, 28 U.S.C. § 1341, provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law, where a plain, speedy and efficient remedy may be had in the court of such State. 28 U.S.C. § 1341.

## STATEMENT OF THE CASE

Cross-Respondent, Mr. Zipperer, adopts and incorporates herein the Statement of the Case as presented in his Petition for Writ of Certiorari. The Statement of the Case is reprinted in the appendix. (App. A). A copy of the Amended Complaint filed by Mr. Zipperer is also reprinted in the appendix. (App. B).

## SUMMARY OF ARGUMENT

The Eleventh Circuit held that the Tax Injunction Act, 28 U.S.C. § 1341, does not bar federal court jurisdiction over this case. Mr. Zipperer is challenging the superpriority accorded a special assessment lien and the validity of the state procedures which allowed the lien to have priority ahead of his prior, recorded purchase money mortgage. The Eleventh Circuit concluded that the Tax Injunction Act does not bar this lien contest in federal court. *Zipperer v. City of Ft. Myers*, 41 F.3d 619 (11th Cir. 1995). By contrast, the Fifth Circuit held in *Tramel v. Schrader*, 505 F.2d 1310 (5th Cir. 1975), that a similar dispute regarding a state special assessment was subject to the bar of the Tax Injunction Act. This Court should exercise jurisdiction over this matter and grant the Petition and Cross-Petition for a Writ of Certiorari to resolve the conflict of law existing between the Eleventh Circuit and the Fifth Circuit.

## ARGUMENT

This Court should accept the Petitioner/Cross-Respondent's (Mr. Zipperer's) Petition for a Writ of Certiorari. The Eleventh Circuit's decision regarding the inapplicability of the Tax Injunction Act is in direct conflict with the Fifth Circuit's prior holding in *Tramel v. Schrader*, 505 F.2d 1310 (5th Cir. 1975), in a similar dispute regarding a state assessment. *Zipperer v. City of Ft. Myers*, 41 F.3d 619 (11th Cir. 1995).

### THE ELEVENTH CIRCUIT COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS; THEREFORE, THIS COURT SHOULD GRANT CERTIORARI SO THAT THE CONFLICT MAY BE RESOLVED.

While a review on a writ of certiorari is not a matter of right, the Court, in exercising its discretion in determining whether to grant a petition, should consider the following:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter . . .

Rule 10, Rules of the Supreme Court. In this case, there is a direct conflict between the decision rendered by the Eleventh Circuit and decisions previously rendered by the Fifth Circuit and Eighth Circuit. Thus, this Court should exercise its power of supervision and grant certiorari review of this dispute. Rule 10, Rules of the Supreme Court.

The certiorari jurisdiction of the Supreme Court is to be exercised primarily for the purpose of resolving conflicts among circuit courts of appeal concerning interpretation of federal law. *Braxton v. United States*, 500 U.S. 344 (1991). As this brief will illustrate, the decision of the Eleventh Circuit is in direct conflict with a previous decision of the Fifth Circuit. Therefore, this court should grant Certiorari.

The Tax Injunction Act limits federal court jurisdiction as follows:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law, where a plain, speedy and efficient remedy may be had in the court of such State. 28 U.S.C. § 1341.

In *Zipperer*, the Eleventh Circuit found that the Tax Injunction Act did not bar federal court jurisdiction over a mortgagee's challenge to the super-priority accorded a City's special assessment lien. The Eleventh Circuit relied on the Tenth Circuit's ruling in *Director of Revenue, State of Colorado v. United States*, 392 F.2d 307 (10th Cir. 1968), to find that this "lien priority" contest was not barred by the Tax Injunction Act.

In *Tramel*, however, the Fifth Circuit found that the Tax Injunction Act barred federal court jurisdiction over a suit to enjoin the collection of special assessments imposed by a city. The Fifth Circuit analyzed the intent of Congress in enacting the Tax Injunction Act and concluded that the special assessments at issue were included within the broad definition of "tax" to which the Tax Injunction Act applied. The Fifth Circuit also stated

that Congress had intended for the Tax Injunction Act to "end the use of the federal courts to disrupt the collection of local revenues . . . " *Id.* at 1316.

Factually, *Zipperer* and *Tramel* are similar in that both cases involved challenges to city imposed special assessments for improvements including streets. Additionally, both cases involved procedural due process and constitutional claims with respect to the imposition of the special assessments at issue. Both cases involved special assessments levied against property to pay the cost of improvements constructed.

In addition to the Fifth Circuit's holding in *Tramel*, the Eleventh Circuit's decision in *Zipperer* also clashes with the Eighth Circuit's ruling in *Burris v. City of Little Rock*, 941 F.2d 717 (8th Cir. 1991). *Burris* also involved a challenge by property owners to assessments levied against their properties to pay for sewer improvements. In *Burris*, the Eighth Circuit noted that challenges to special assessments involve "state taxes" and are accordingly subject to the Tax Injunction Act's bar against federal court jurisdiction.

Thus, the Eleventh Circuit's holding that the Tax Injunction Act does not bar federal jurisdiction over Mr. Zipperer's claims directly conflicts with the previous decisions of other circuit courts. This Court should grant certiorari to resolve the conflict.

## CONCLUSION

As set forth herein, the decision of the Eleventh Circuit Court of Appeals is in direct conflict with a previous decision of the Fifth Circuit Court of Appeals. The Cross-Respondent respectfully requests that this Court find that federal court jurisdiction exists in this case and grant the Petition and Cross-Petition for a Writ of Certiorari.

Respectfully submitted,

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# APPENDIX A

* * *

## STATEMENT OF THE CASE

### A. Factual Summary

On August 14, 1986, P. Gerald DeSimone, as trustee, executed and delivered a promissory note for $8,900,000.00 to Mr. John O. Zipperer, Jr. ("Mr. Zipperer"). To secure the promissory note, Mr. DeSimone delivered a first mortgage to Mr. Zipperer which was recorded that same day in Official Record Book 1862, pages 4282-4286 of the Public Records of Lee County, Florida. The Mortgage granted Mr. Zipperer a first mortgage lien on the real property described in the mortgage, prohibited impairment of the property by Mr. DeSimone and stated Mr. Zipperer's name and mailing address.

After the recording of the first mortgage lien, the City of Fort Myers and Lee County, Florida created special assessment districts which included the mortgaged property. These districts built unnecessary and ultimately worthless highways, sewers and water lines which would never have been built through normal commercial institution lending. Then, between March 7, 1988 and October 24, 1990, the City of Fort Myers and Lee County held a series of special assessment hearings. They then passed resolutions at those hearings which purported to create huge super-priority special assessment liens on properties located within the special assessment districts. The resolutions passed by the City of Fort Myers created an estimated $13,000,000 of special assessment liens for

water and sewer facilities in Improvement District 10, an estimated $10,900,000 in special assessment liens for water distribution, wastewater collection, roadway and paving improvements in Improvement District 15; and an estimated $6,017,000 in special assessment liens for roadway improvements in Improvement District 17. Collectively, the resolutions passed by the City of Fort Myers also provided that a total of $919,600 in special assessment funds were to be paid to the City for "administration" of these special assessments. The resolutions passed by Lee County also purported to create super-priority special assessment liens in the amount of $4,791,325 for roadway improvements in the Colonial Road Extension Special Improvement District. All the special assessment liens created at these hearings purported to take priority over and subordinate Mr. Zipperer's first mortgage lien.

Mr. DeSimone, the owner, was given prior written notice of each of these special assessment and lien creation hearings. Under Florida Statutes, Chapter 170 (App. E) written notice only went to the property owner (who already knew of the special assessments because he requested them) but not to owners of first mortgages which would be subordinated by the super-priority assessment liens. Neither the City of Fort Myers nor Lee County gave Mr. Zipperer prior written notice of any of these special assessment hearings and Mr. Zipperer did not participate in those hearings. Instead of providing mortgagees, such as Mr. Zipperer, with prior written notice, the City of Fort Myers and Lee County merely published notices of the special assessment hearings in a local newspaper. The published notice did *not* disclose

that the assessment liens would subordinate prior recorded mortgages.

On April 18, 1991, after the purported creation of these super-priority special assessment liens, Mr. Zipperer filed a foreclosure action on the mortgaged property in Florida's 20th Judicial Circuit in and for Lee County, Florida. On November 26, 1991, the court granted Mr. Zipperer a Judgment of Foreclosure and the mortgaged property was subsequently sold and a certificate of title issued to Mr. Zipperer on February 4, 1992. Mr. Zipperer then filed a motion for relief from foreclosure judgment to the extent made necessary by the claimed super-priority special assessment liens and simultaneously filed a lawsuit in the Federal District Court for the Middle District of Florida seeking to resolve the Federal Question raised by the City of Fort Myers and Lee County's alleged super-priority special assessment liens.

**B. Procedural History**

Mr. Zipperer filed his original complaint in this action on November 25, 1992, which was amended on October 27, 1993. This case presents a federal question under 28 U.S.C. § 1331 because the amended complaint alleges both the City of Fort Myers and Lee County denied Mr. Zipperer procedural due process when they failed to provide Mr. Zipperer with prior written notice of special assessment hearings which materially and adversely affected Mr. Zipperer by imposing special assessment liens which purported to subordinate Mr. Zipperer's prior-recorded first mortgage. Mr. Zipperer's

name and address were clearly stated in the prior-recorded mortgage. As a direct result of the City's and County's failure to provide Mr. Zipperer with notice, Mr. Zipperer lost a significant property interest when his first mortgage was subordinated to a junior lien without Mr. Zipperer's prior knowledge. Mr. Zipperer's request for relief asked that the court grant declaratory relief, a prioritization of the liens, foreclosure of the City of Fort Myers and Lee County's special assessment liens, compensatory damages and such other relief as would be just, necessary and proper.

After a hearing on the Defendants' motions to dismiss or in the alternative motions for summary judgment, the District Court granted summary judgment and dismissed the case. (App. B). The exact basis for the District Court's holding was unclear. On one hand, the District Court stated "the theory of the plaintiff now at bar" had been put to rest. (App. B, B3). On the other hand, the District Court held that "procedural due process requires an opportunity to be heard either pre- or *post*-action" and that "[i]n this type of case the State of Florida gives the plaintiff ample opportunity to litigate this question." (App. B, B3).

On January 3, 1995, the Eleventh Circuit Court of Appeals issued an opinion, affirming the District Court's Order granting summary judgment, which is reported as *Zipperer v. City of Fort Myers*, 41 F.3d 619 (11th Cir. 1995) (App. A). After determining that the Federal Courts had jurisdiction of Mr. Zipperer's claims, the Eleventh Circuit denied Mr. Zipperer's procedural due process claim, though it noted that the United States Supreme Court had never directly addressed the issue presented.

Mr. Zipperer and the City of Fort Myers both filed timely motions for rehearing. The City of Fort Myers requested the court to reconsider its holding that the Tax Injunction Act did not bar Federal Jurisdiction of this case. (App. D). Both motions were denied by the Eleventh Circuit on February 10, 1995. (App. C).

* * *

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

JOHN O. ZIPPERER, JR., an individual,

Plaintiff,

vs.

Case No. 93-108-CIV-FTM-23D

FBN 280283

THE CITY OF FORT MYERS, a chartered municipality and political subdivision of the State of Florida; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 15, Omni Interstate Park; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 17; IMPROVEMENT DISTRICT NO. 10, NORTHEAST COLONIAL SEWER AND WATER ASSESSMENT DISTRICT; IMPROVEMENT DISTRICT NO. 15, OMNI INTERSTATE PARK; IMPROVEMENT DISTRICT NO. 17; LEE COUNTY, a political subdivision of the State of Florida; COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT BOARD, as the

Governing Authority of the Dependant Special District known as Colonial Road Extension Improvement Special District; and COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT,

Defendants.

_____/

AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff, JOHN O. ZIPPERER, JR. ("Mr. Zipperer"), sues Defendants, THE CITY OF FORT MYERS ("City"), a chartered municipality and political subdivision of the State of Florida; FORT MYERS CITY COUNCIL, as Governing Authority of Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District ("District 10 Governing Authority"); FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 15, Omni Interstate Park ("District 15 Governing Authority"); FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 17 ("District 17 Governing Authority"); IMPROVEMENT DISTRICT NO. 10, NORTHEAST COLONIAL SEWER AND WATER ASSESSMENT DISTRICT ("District 10"); IMPROVEMENT DISTRICT NO. 15, OMNI INTERSTATE PARK ("District 15"); IMPROVEMENT DISTRICT NO. 17 ("District 17"); LEE COUNTY ("County"), a political subdivision of the State of Florida; COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT BOARD, as the Governing Authority of the Dependant Special District known as Colonial Road Extension

Improvement Special District ("Board"), and COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT ("Special District"), and alleges:

## GENERAL ALLEGATIONS

1. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 as a federal question action.

2. Plaintiff is a citizen of the State of Florida and a resident of Lee County, Florida.

3. City is a chartered municipality pursuant to Chapter 165, Florida Statutes, and a political subdivision of the State of Florida.

4. District 10 Governing Authority is the governing authority of District 10 pursuant to Chapter 170, Florida Statutes and Resolution No. 86-48 of the Fort Myers City Council, Florida ("City Council").

5. District 15 Governing Authority is the governing authority of District 15 pursuant to Chapter 170, Florida Statutes and City Council Resolution No. 88-56.

6. District 15 Governing Authority is the governing authority of District 17, pursuant to Chapter 170, Florida Statutes and City Council Resolution No. 86-64.

7. District 10 is an improvement district pursuant to Chapter 170, Florida Statutes and City Council Resolution No. 86-48.

8. District 15 is an improvement district pursuant to Chapter 170, Florida Statutes and City Council Resolution No. 86-48.

9. District 17 is an improvement district pursuant to Chapter 170, Florida Statutes and City Council Resolution No. 86-48.

10. County is a non-chartered political subdivision of the State of Florida.

11. Board is the governing authority of the Special District pursuant to Section 125.01, Chapter 170 and Chapter 189, Florida Statutes, and Lee County Ordinance No. 90-08.

12. Special District is a Dependant Special District pursuant to Section 125.01 and Chapter 189, Florida Statutes and Lee County Ordinance No. 90-08.

13. All conditions precedent to the relief requested herein have been performed, have occurred or have otherwise been waived.

14. Mr. Zipperer demands a jury trial on all issues.

## FACTS

15. On August 14, 1986, P. Gerald DeSimone, Trustee ("DeSimone"), executed and delivered to Mr. Zipperer a Promissory Note in the principal amount of Eight Million Nine Hundred Thousand and No/100 Dollars ($8,900,000.00) which called for three (3) annual payments of interest only and thereafter for six (6) annual payments of principal and interest in the amount of One Million Five Hundred Eleven Thousand Two Hundred Twenty and No/100 Dollars ($1,511,220.00) with the remaining outstanding principal and all accrued interest to be due and payable on maturity on August 14, 1996. A true and correct copy of the Promissory Note is attached

to the original Complaint and incorporated herein as Exhibit 1.

16. On August 14, 1986, in order to secure the Promissory Note referred to above, DeSimone executed and delivered to Mr. Zipperer a Mortgage Deed which was recorded on August 14, 1986 in Official Record Book 1862, Pages 4282-4286, of the Public Records of Lee County, Florida and by which DeSimone granted to Mr. Zipperer a security interest in and to the real property described in the Mortgage Deed together with all oil, gas and mineral rights (the "Mortgaged Property"). In the Mortgage Deed, DeSimone warranted that the Mortgaged Property was free from all encumbrances. The mortgage had no provision providing for any subordination of Mr. Zipperer's mortgage to any subsequent development or construction financing and, indeed, Mr. Zipperer specifically objected to any such provision when the mortgage terms were negotiated. In addition, the Mortgage Deed which was recorded and thus giving constructive notice to anyone attempting to impose a subsequent lien on the property, contains a provision expressly prohibiting "waste, *impairment* or deterioration of said property or any part thereof." A true and correct copy of the Mortgage Deed is attached to the original Complaint and incorporated herein as Exhibit 2.

17. On November 18, 1986, Mr. Zipperer and DeSimone entered into a Mortgage Modification Agreement which was recorded on December 9, 1986, in official Record Book 1884, Pages 1456-1457, of the Public Records of Lee County, Florida and which modified the terms of the Mortgage Deed to include as security for the Promissory Note all oil and mineral rights to the real property

described in Exhibit 3, attached to the original Complaint and incorporated herein by reference. A true and correct copy of the November 18, 1986 Mortgage Modification Agreement is attached to the original Complaint and incorporated herein as Exhibit 4.

18. On October 26, 1990, Mr. Zipperer and DeSimone entered into a Mortgage Modification Agreement which was recorded on November 8, 1990, in Official Record Book 2185, Pages 4652-4654, of the Public Records of Lee County, Florida and which modified the terms of the Mortgage Deed to provide for a payment of unpaid interest and accrued interest thereon to be due and payable on December 1, 1990 and thereafter for annual payments of principal and interest commencing on August 14, 1992 with all remaining outstanding principal and accrued interest thereon to be due and payable at maturity on August 14, 1996. A true and correct copy of the October 26, 1990 Mortgage Modification Agreement is attached to the original Complaint and incorporated herein as Exhibit 5.

19. Mr. Zipperer owns and holds the Mortgage Deed, Promissory Note, November 18, 1986 Mortgage Modification Agreement and the October 26, 1990 Mortgage Modification Agreement. Under Florida law, the subordination of a preexisting mortgage from a first to a second lien position is recognized as an immediate impairment. Any subordination automatically puts the preexisting mortgagee at a substantially greater risk of losing its investment if it has a second, as opposed to a first, priority lien without even considering the value of the underlying property.

20. The Mortgaged Property is made up of Parcel Nos. 27-44-25-OC-08606.0000 ("8606"), 26-44-25-OC-08602.0000 ("8602"), and 22-44-25-OC-08601.0000 ("8601").

21. Pursuant to City Council Resolution No. 88-28, as amended by City Council Resolution No. 90-46, a Development Order was issued for Omni Interstate Park, which includes the Mortgaged Property.

## DISTRICT 10

22. On September 22, 1986, City Council entered Resolution No. 86-48 which created District 10 in the City of Fort Myers, Florida and in Lee County, Florida. District 10, which included the Mortgaged Property, was created pursuant to Chapter 170, Florida Statutes, "for the construction of local sanitary sewage transmission mains, lift stations, water transmission mains, and other appurtenant facilities." The estimated cost of construction in District 10 was $13,000,000.00 with $10,000,000.00 to be borne by the properties in District 10, including the Mortgaged Property. A true and correct copy of Resolution No. 86-48 is attached to the original Complaint and incorporated herein as Exhibit 6.

23. Through Resolution No. 88-5 of February 16, 1988, the District 10 Governing Authority adopted the assessment roll for District 10. Resolution No. 88-5 contemplated that property owners and "other persons interested" in the property (presumably other directly affected persons, such as mortgagees) could appear before the District 10 Governing Authority to be heard as to the

propriety and advisability of the improvements to District 10, the assessments and the method of assessment. However, Resolution No. 88-5 only directed that property owners receive written notice of the meeting to be held to discuss these issues. Nowhere did Resolution No. 88-5 provide for written notice to mortgagees or any other interested parties, though mortgagees could have been easily identified through the public records. In fact, the City Clerk or consulting engineer did review the public records to locate the names of the property owners to receive the written notice. Given that fact, deriving from those same public records the identity of prior recorded mortgages and providing written notice to those mortgagees that special assessment that would subordinate their lien mortgage was under consideration would have been a very straight forward matter. The additional administrative "burden" would thus have been the few additional minutes of title search by the person already looking for the property owners to locate the mortgages, typing a letter and envelope and a stamp. Given the fact that $377,000.00 out of the $10,000,000.00 went directly to the City for "administration," this "burden" is not unreasonable. The assessment roll attached to Resolution No. 88-5 included Parcel Nos. 8601 and 8602, but did not include Parcel No. 8606. A true and correct copy of Resolution No. 88-5 is attached hereto and incorporated herein as Exhibit 7.

24. Through Resolution No. 88-8 of March 7, 1988, the District 10 Governing Authority levied certain special assessments on the properties on the District 10 assessment roll and "confirmed," self-servingly in that no bond validation proceeding was filed in the circuit court, the

assessments as legal, valid and binding first liens, coequal with the lien of other taxes and superior to all other liens, titles and claims, until paid. Resolution No. 88-8 directed the City Clerk to record the assessments. Resolution No. 88-8 was recorded in Official Record Book 2002, Pages 2419-2430 of the Public Records of Lee County, Florida. A true and correct copy of Resolution No. 88-8 is attached to the original Complaint and incorporated herein as Exhibit 8.

25. Through Resolution No. 89-70 of November 6, 1989, the District 10 Governing Authority authorized the City Clerk to file a lien on the District 10 properties, including the Mortgaged Property for the unpaid pro rata cost of improvements made in District 10. Resolution No. 89-70 included Parcel Nos. 8801, 8802 and 8806. Resolution No. 89-70 was recorded in Official Record Book 2109, Pages 3829-3838 of the Public Records of Lee County, Florida. A true and correct copy of Resolution No. 89-70 is attached to the original Complaint and incorporated herein as Exhibit 9.

26. Although the actual improvements for Phase I of the District 10 improvements were only $8,235,757.00, through Resolution No. 89-70, the District 10 Governing Authority authorized the liening of the District 10 properties, including the Mortgaged Property, for a pro rata cost per acre for $10,000,000, that is, the full amount of the estimated cost of improvements to be borne by the District 10 properties.

27. Although Mr. Zipperer was a prior mortgage holder through the Mortgage Deed which is Exhibit 2, Mr. Zipperer was not given actual written notice of the

proposed District 10 assessments, nor any of the other proposed Districts described below, explaining that the assessments would become a "first lien" over his first mortgage.

**DISTRICT 15.**

28. On October 17, 1988, City Council entered Resolution No. 88-56 which created District 15 in the City of Fort Myers, Florida. District 15, which included the Mortgaged Property, was created pursuant to Chapter 170, Florida Statutes, "for the construction of a water distribution system, wastewater collection system, paving improvements, including the construction of Omni Boulevard, S.E. entrance and Cypress Loop Road and other appurtenant facilities." The estimated cost of construction in District 15 was $10,900,000.00. A true and correct copy of Resolution No. 88-56 is attached to the original Complaint and incorporated herein as Exhibit 10.

29. Through Resolution No. 89-26 of April 17, 1989, the District 15 Governing Authority adopted the assessment roll for improvements to District 15. Resolution No. 89-26 contemplated that owners of the property and "other persons interested" (presumably other directly affected persons, such as mortgagees) in the property could appear before the District 15 Governing Authority to be heard as to the propriety and advisability of the improvements to District 15, the assessments, and the method of assessment. However, Resolution No. 89-26 only directed that property owners receive written notice of the meeting to be held to discuss these issues. *Nowhere* did Resolution No. 89-26 provide for written notice to

mortgagees or any other interested parties, though mortgagees could have been easily identified through the public records. The City Clerk or consulting engineers in fact did review the public records to locate the names of the property owners to receive the written notice. Given that fact, searching those same public records to determine the indentity [sic] of prior recorded mortgages and providing written notice to those mortgagees that a special assessment would subordinate their mortgage was under consideration would have been a very straight forward matter. The additional administrative "burden" would thus have been the few additional minutes of title search by the person already looking for the property owners to locate the mortgages, typing a letter and envelope and a stamp. Given the fact that $282,600.00 out of the $10,900,000.00 went directly to the City for "Administration," this "burden" is not unreasonable. The assessment roll included Parcels No. 8606, 8602, and 8601. A true and correct copy of Resolution No. 89-26 is attached to the original Complaint and incorporated herein as Exhibit 11.

30. Through Resolution No. 89-32 of May 15, 1989, the District 15 Governing Authority levied certain special assessments on the properties on the District 15 assessment roll and "confirmed," self-servingly in that no bond validation proceeding was filed in the circuit court, the assessments as legal, valid and binding first liens, coequal with liens of other taxes and superior to all of the liens, titles, and claims, until paid. Resolution No. 89-32 directed the City Clerk to record the assessments. Resolution No. 89-32 was recorded in official Record Book 2072, Pages 3091-3094 of the Public Records of Lee County,

Florida. These special assessments, as recorded in Resolution No. 89-32, have been imposed as a lien on the property. A true and correct copy of Resolution No. 89-32 is attached to the original Complaint and incorporated herein as Exhibit 12.

## DISTRICT 17

31. On November 21, 1988, City Council entered Resolution No. 88-64 which created District 17 in the City of Fort Myers, Florida. District 17, which included the Mortgaged Property, was created pursuant to Chapter 170, Florida Statutes, for the design and installation of roadways and other appurtenant facilities. The estimated cost of construction in District 17 was $6,017,000.00. A true and correct copy of Resolution No. 88-64 is attached hereto and incorporated to the original Complaint as Exhibit 13.

32. Through Resolution No. 89-25 of April 17, 1989, the District 17 Governing Authority adopted the assessment roll for the improvements to District 17. Resolution No. 89-25 contemplated that owners of the property and "other persons interested" (presumably other directly affected persons, such as mortgagees) in the property could appear before the City Council to be heard as to the propriety and advisability of the improvements to District 17, the assessments, and the method of assessment. However, Resolution No. 89-25 only directed that property owners receive written notice of the meeting to discuss these issues. *Nowhere* did Resolution No. 89-25 provide for written notice to mortgagees or any other interested parties, although mortgagees could have been

easily identified through the public records. The City Clerk or consulting engineers in fact did review the public records to locate the names of the property owners to receive the written notice. Given that fact, searching those same public records to determine the identity of prior recorded mortgages and providing written notice to those mortgagees that a special assessment would subordinate their mortgage was under consideration would have been a very straight forward matter. The additional administrative "burden" would thus have been the few additional minutes of title search by the person already looking for the property owners to locate the mortgages, typing a letter and envelope and a stamp. Given the fact that $260,000.00 out of the $6,017,000.00 went directly to the City for Administration, this "burden" is not unreasonable. The assessment roll included Parcel Nos. 8606, 8602, and 8601. A true and correct copy of Resolution No. 89-25 is attached to the original Complaint and incorporated herein as Exhibit 14.

33. Through Resolution No. 89-33 of May 15, 1989, the District 17 Governing Authority levied certain special assessments on the properties on the District 17 assessment roll and "confirmed," self-servingly in that no bond validation proceeding was filed in the circuit court, the assessments as legal, valid, and binding first liens, coequal with liens of other taxes and superior to all other liens, titles, and claims, until paid. Resolution No. 89-33 directed the City Clerk to record the assessments. Resolution No. 89-33 was recorded in Official Record Book 2072, Pages 3095-3099 of the Public Records of Lee County, Florida. A true and correct copy of Resolution No. 89-33

is attached to the original Complaint and incorporated herein as Exhibit 15.

## SPECIAL DISTRICT

34. On October 11, 1989, DeSimone entered into an Agreement with the City and County to levy special assessments on the Mortgaged Property. A true and correct copy of the Agreement is attached to the original Complaint and incorporated herein as Exhibit 16.

35. On February 21, 1990, the Lee County Board of County Commissioners passed Ordinance No. 90-08 which created the Special District, pursuant to Section 125.01 and Chapter 189, Florida Statutes, included the Mortgaged Property, for road improvements in Lee County and the City of Fort Myers, Florida. Through Ordinance No. 90-08, the Board levied special assessments to finance the improvements. A true and correct copy of Ordinance No. 90-08. is attached to the original Complaint and incorporated herein as Exhibit 17.

36. On October 24, 1990, the Board entered Resolution No. 1 which ratified the substantial completion of the acquisition and construction of the Special District improvements. Resolution No. 1 indicated that notice had been given to the property owners of the hearing to discuss these improvements and the assessments. However, Resolution No. 1 made no mention of notice to mortgagees or any other interested parties, although mortgagees could have been easily identified through the public records. Presumably, someone at the County or at the County's direction reviewed the public records to locate the names of the property owners to receive the

written notice. In the process of conducting a title search to determine ownership, it would be an easy matter to also search for prior recorded mortgages. Providing such notice that a special assessment that would subordinate the mortgage was under consideration would be a "minor" burden and would only involve some slight additional title work, typing a letter and envelope and a stamp. The County contemplated that property owners and those interested in the property could attend the hearing, however, notice was only given to the owners. Resolution No. 1 provides that the special assessments would constitute a lien upon the property, a first lien superior in dignity to all other liens, titles, and claims, until paid. The amount assessed on the Omni Interstate Park property, which includes the Mortgaged Property, as part of the Special District was $1,000,000.00. A true and correct copy of Resolution No. 1 is attached to the original Complaint and incorporated herein as Exhibit 18.

37. On September 21, 1990, DeSimone entered into a Supplemental Agreement with the City and County to levy special assessments on the Mortgaged Property. A true and correct copy of the Supplemental Agreement is attached to the original Complaint and incorporated herein as Exhibit 19.

38. Through Resolution No. 2 of October 24, 1990, the Board adopted the assessments and imposed them on the properties in the Special District, including the Mortgaged Property. A true and correct copy of Resolution No. 2 is attached to the original Complaint and incorporated herein as Exhibit 20.

39. Through Resolution No. 3 of September 23, 1991, the Board "confirmed," self-servingly in that no bond validation proceeding was filed in the circuit court, the Agreement and Supplemental Agreement and the assessments and levied the assessments on the Special District Property, including the Mortgaged Property. Resolution No. 3 was recorded in official Record Book 2299, Pages 426-446 of the Public Records of Lee County, Florida. A true and correct copy of Resolution No. 3 is attached to the original Complaint and incorporated herein as Exhibit 21.

## COUNT I

Cause of Action Against City, District 10 Governing Authority, District 15 Governing Authority, District 17 Governing Authority, District 10, District 15 and District 17:
Denial of Mr. Zipperer's Right to Due Process

Mr. Zipperer realleges and incorporates by reference the allegations contained in paragraphs 1 through 39 as if fully set forth herein.

40. The City, District 10 Governing Authority, District 15 Governing Authority, District 17 Governing Authority, District 10, District 15 and District 17 (hereinafter collectively "City Entities") failed to provide Mr. Zipperer with notice reasonably calculated to apprise him of the pendency of an action which materially altered his property interest in the Mortgaged Property.

41. The Fourteenth Amendment to the United States Constitution and Article X, Section VI of the Florida

Constitution provide that no state shall deprive any person of life, liberty or property without due process of law.

42. Mr. Zipperer, as mortgagee, has a legally protected property interest and was entitled to written notice reasonably calculated under the circumstances to apprise him of the pendency of an action which would diminish the value of his security interest in the Mortgaged Property. Mr. Zipperer was also entitled to notice that the special assessment would become a lien superior to Mr. Zipperer's security interest in the Mortgaged Property which would subordinate his interest, particularly where Mr. Zipperer's security interest was easy to identify through the public records of Lee County and expressly prohibited any impairment. The Mortgage Deed's unencumbered interest and waste provisions should have put the City on notice that Mr. Zipperer's interest was a first lien and that that first lien contemplated that no diminishing in value of the security interest or subrogation of the first lien would occur, including diminished value and subrogation through the imposition of special assessment liens.

43. The Resolutions which the City Entities passed to levy special assessments on the District 10, 15 and 17 properties, including the Mortgaged Property, were adopted pursuant to including the provisions of Chapter 170, Florida Statutes. Chapter 170, Florida Statutes provides supplemental and alternative methods for making local and municipal improvements. Any such improvements, however, must be for a public purpose and provide a benefit reasonably related to the amount of the assessment on the land to be assessed. Section 170.07, Florida Statutes, provides that the governing authority, in

this instance the District 10, 15 and 17 Governing Authorities, shall fix a time whereby the owners of property to be assessed, or any other interested persons, may appear before the governing authority to be heard as to the propriety and advisability of making the improvements and the assessments. Section 170.07, Florida Statutes also provides that ten (10) days written notice in writing of the hearing time and place shall be given to the property owners by certified mail. Section 170.09, Florida Statutes provides the special assessment lien will be coequal with the lien of other taxes and superior to all other liens.

44. The City Entities never provided Mr. Zipperer, a holder of a mortgage and security interest in the Mortgaged Property which was part of the property affected by the Resolutions, with actual written notice that the City Entities intended to impose a special assessment upon the Mortgaged Property and that the special assessment would purportedly become a lien superior to Mr. Zipperer's security interest in the Mortgaged Property. The City Entities' failure to notify Mr. Zipperer was founded on an improper motive, particularly given the ease with which the City Entities could have of [sic] provided notice to lien holders, with a desire to protect only their interests at the expense and in wilful disregard of the rights of innocent lien holders. In addition, the City Entities failure to notify Mr. Zipperer was done through arbitrary or pretextual means and had no rational basis.

45. The City Entities could easily have determined Mr. Zipperer's interest as a mortgagee by conducting a title search of the properties contained within Districts 10, 15, and 17. Indeed, it is required by law that the mortgagee be notified, and the mortgagee is required to

join in such things as a plat which is recorded after the mortgage. See Section 177.081, Florida Statutes.

46. Mr. Zipperer was entitled to written notice reasonably calculated under all the circumstances to apprise him of the pendency of the City Entities' action and to afford him the opportunity to present his objections to the action where such action affected his interest in the Mortgaged Property. Specifically, Mr. Zipperer had an interest as the holder of a purchase money mortgage in the Mortgaged Property, which was included in Districts 10, 15, and 17, to notice of the proposed special assessments and their nature.

47. As a direct and proximate result of the City Entities' failure to provide written notice, Mr. Zipperer lost a significant property interest in having his first purchase money mortgage purportedly subrogated by operation of law to the status behind the District 10, 15 and 17 special assessment liens and suffered an illegal impairment and taking of his contract rights, without his prior knowledge. Furthermore, the improvements were not for a public purpose and did not provide a benefit reasonably related to the amount of the assessment on the land to be assessed. For example, District 17, which assesses the land subject to Mr. Zipperer's mortgage, has no frontage at all on the road that was built using the revenue from the bonds secured by the assessments.

48. Because the City Entities failed to provide the requisite written notice reasonably calculated under the circumstances to apprise Mr. Zipperer of the pendency of an action which materially affected his security interest in

the Mortgaged Property, the liens attached to the Mortgaged Property through Parcels 8606, 8602, and 8601 for Districts 10, 15, and 17 should be subordinated as junior liens to Mr. Zipperer's purchase money mortgage and foreclosed.

49. The City Entities denied Mr. Zipperer his right to due process, as provided under the United States and Florida Constitutions.

WHEREFORE, Mr. Zipperer requests declaratory relief, a prioritization of the liens, foreclosure of the District 10, 15 and 17 special assessment liens, equitable subordination of the District 10, 15 and 17 Special Assessment lien, compensatory damages, the cost of this action, and other such relief as the Court deems just, necessary, and proper.

## COUNT II

Cause of Action Against County,
Board and Special District:
Denial of Mr. Zipperer's Right to Due Process

Mr. Zipperer realleges and incorporates by reference the allegations contained in paragraphs 1 through 39 as if fully set forth herein.

50. County, Board and Special District (hereinafter collectively "County Entities") failed to provide Mr. Zipperer with written notice reasonably calculated to apprise him of the pendency of an action which materially altered his property interest in the Mortgaged Property.

51. The Fourteenth Amendment to the United States Constitution and Article X, Section VI of the Florida

Constitution provide that no state shall deprive any person of life, liberty or property without due process of law.

52. Mr. Zipperer, as mortgagee, has a legally protected property interest and was entitled to written notice reasonably calculated under the circumstances to apprise him of the pendency of an action which would diminish the value of his security interest in the Mortgaged Property. Mr. Zipperer was also entitled to written notice that the special assessment would become a lien superior to Mr. Zipperer's security interest in the Mortgaged Property which would subordinate his interest, particularly where Mr. Zipperer's security interest was easy to identify through the public records of Lee County. The Mortgage Deed's unencumbered interest and waste provisions should have put the City on notice that Mr. Zipperer's interest was a first lien and that that first lien contemplated that no diminishing in value of the security interest or subrogation of the first lien would occur, including diminished value and subrogation through the imposition of special assessment liens.

53. The Ordinance and Resolutions which the Board passed to levy special assessments on the special District properties, including the Mortgaged Property, were adopted pursuant to the provisions of Section 125.01 Chapter 170 and Chapter 189, Florida Statutes. Section 125.01, Florida Statutes provides supplemental and alternative methods for making local improvements. Chapter 170, Florida Statutes provides supplemental and alternative methods for making local and municipal improvements. Any such improvements, however, must be for a public purpose and provide a benefit reasonably related to the amount of the assessment on the land to be

assessed. Section 170.07, Florida Statutes, provides that the governing authority, in this instance the District 10, 15 and 17 Governing Authorities, shall fix a time whereby the owners of property to be assessed, or any other interested persons, may appear before the governing authority to be heard as to the propriety and advisability of making the improvements and the assessments. Section 170.07, Florida Statutes also provides that ten (10) days' notice in writing of the hearing time and place shall be given to the property owners by certified mail. Section 170.09, Florida Statutes provides the special assessment lien will be coequal with the lien of other taxes and superior to all other liens.

54. The County Entities never provided Mr. Zipperer, a holder of a mortgage and security interest in the Mortgaged Property which was part of the property affected by the Ordinance and Resolutions, with actual written notice that the County Entities intended to impose a special assessment upon the Mortgaged Property and that the special assessment would purportedly become a lien superior to Mr. Zipperer's security interest in the Mortgaged Property. The County Entities' failure to notify Mr. Zipperer was founded on an improper motive, particularly given the ease with which the County Entities could have provided written notice to lien holders, with a desire to protect only their interests at the expense and in wilful disregard of the rights of innocent lien holders. In addition, the County Entities failure to notify Mr. Zipperer was done through arbitrary or pretextual means and had no rational basis.

55. The County Entities could easily have determined Mr. Zipperer's interest as a mortgagee by conducting a title search of the properties contained within Special District. Indeed, it is required by law that the mortgagee be notified, and the mortgagee is required to join in such things as a plat which is recorded after the mortgage. See Section 177.081, Florida Statutes.

56. Mr. Zipperer was entitled to written notice reasonably calculated under all the circumstances to apprise him of the pendency of the City Entities' action and to afford him the opportunity to present his objections to the action where such action affected his interest in the Mortgaged Property. Specifically, Mr. Zipperer had an interest as the holder of a purchase money mortgage in the Mortgaged Property, which was included in Special District, to notice of the Special District special assessments and their nature.

57. As a direct and proximate result of the County Entities' failure to provide written notice, Mr. Zipperer lost a significant property interest in having his first purchase money mortgage purportedly subrogated by operation of law to the status of a junior lien, behind the Special District special assessment lien, and suffered an illegal impairment and taking of his contract rights, without his prior knowledge. Furthermore, the improvements were not for a public purpose and did not provide a benefit reasonably related to the amount of the assessment on the land to be assessed. For example, District 17, which assesses the land subject to Mr. Zipperer's mortgage, has *no* frontage at all on the road that was built using the revenue from the bonds secured by the assessments.

58. Because the county Entities failed to provide the requisite written notice reasonably calculated under the circumstances to apprise Mr. Zipperer of the pendency of an action which materially affected his security interest in the Mortgaged Property, the lien attached to the Mortgaged Property through Parcels 8606, 8602, and 8601 for Special District should be subordinated as a junior lien to Mr. Zipperer's purchase money mortgage and foreclosed.

59. The County Entities denied Mr. Zipperer his right to due process as provided under the United States and Florida Constitutions.

WHEREFORE, Mr. Zipperer requests declaratory relief, a prioritizing of the liens, foreclosure of the Special District special assessment lien, equitable subordination of the Special District Special Assessment lien, compensatory damages, the costs of this action, and such other relief as the Court deems just, necessary, and proper.

## COUNT III

Cause of Action Against City Entities:
§ 1983 Action

Mr. Zipperer realleges and incorporates by reference the allegations contained in paragraphs 1 through 39 as if fully set forth herein.

60. The City Entities acting under color of state law failed to provide Mr. Zipperer with written notice reasonably calculated to apprise him of the pendency of an action which materially altered his property interest in the Mortgaged Property.

61. The Fourteenth Amendment to the United States Constitution and Article X, Section VI of the Florida Constitution provide that no state shall deprive any person of life, liberty or property without due process of law.

62. Mr. Zipperer, as mortgagee, has a legally protected property interest and was entitled to written notice reasonably calculated under the circumstances to apprise him of the pendency of an action which would diminish the value of his security interest in the Mortgaged Property, special assessments would become a lien superior to Mr. Zipperer's security interest in the Mortgaged property and that would become superior to Mr. Zipperer's security interest in the Mortgaged Property which would subordinate his interest, particularly where Mr. Zipperer's security interest was easy to identify through the public records of Lee County. The Mortgage Deed's unencumbered interest and waste provisions should have put the City on notice that Mr. Zipperer's interest was a first lien and that that first lien contemplated that no diminishing in value of the security interest or subrogation of the first lien would occur, including diminished value and subrogation through the imposition of special assessment liens.

63. The Resolutions which the City Entities passed to levy special assessments on the District 10, 15 and 17 properties, including the Mortgaged Property, were adopted pursuant to the provisions of Chapter 170, Florida Statutes. Chapter 170, Florida Statutes provides supplemental and alternative methods for making local and municipal improvements. Any such improvements, however, must be for a public purpose and provide a benefit reasonably related to the amount of the assessment on the

land to be assessed. Section 170.07, Florida Statutes, provides that the governing authority, in this instance the District 10, 15 and 17 Governing Authorities, shall fix a time whereby the owners of property to be assessed or any other interested persons may appear before the governing authority to be heard as to the propriety and advisability of making the improvements and the assessments. Section 170.07, Florida Statutes also provides that ten (10) days' notice in writing of the hearing time and place shall be given to the property owners by certified mail. Section 170.09, Florida Statutes provides the special assessment lien will be coequal with the lien of other taxes and superior to all other liens.

64. Under color of state law, the City Entities never provided Mr. Zipperer who held a mortgage and security interest in the Mortgaged Property, which was a part of the property affected by the Resolutions, with actual written notice that the City Entities intended to impose a special assessment upon the Mortgaged Property and that the special assessments would purportedly become a lien superior to Mr. Zipperer's security interest in the Mortgaged Property.

65. The City Entities could easily have determined Mr. Zipperer's interest as a mortgagee by conducting a title search of the properties contained within Districts 10, 15, and 17. Indeed, it is required by law that the mortgagee be notified, and the mortgagee is required to join in such things as a plat which is recorded after the mortgage. See Section 177.081, Florida Statutes.

66. Mr. Zipperer was entitled to written notice reasonably calculated under the circumstances to apprise

him of the pendency of the City Entities' action and to afford him the opportunity to present his objections to the action where such action affected his interest in the Mortgaged Property. Specifically, Mr. Zipperer had an interest as the holder of a purchase money mortgage in the Mortgaged Property which was included in Districts 10, 15, and 17 to notice of the proposed special assessments and their nature.

67. As a direct and proximate result of the City Entities' failure to provide written notice, Mr. Zipperer lost a significant property interest in having his first Purchase money mortgage purportedly subrogated by operation of law to the status of a junior lien, behind the District 10, 15 and 17 special assessment liens and suffered an illegal impairment and taking of his contract rights, without his prior knowledge. Furthermore, the improvements were not for a public purpose and did not provide a benefit reasonably related to the amount of the assessment on the land to be assessed. For example, District 17, which assesses the land subject to Mr. Zipperer's mortgage, has *no* frontage at all on the road that was built using the revenue from the bonds secured by the assessments.

68. As a direct and proximate result of the City Entities' failure to provide written notice, Mr. Zipperer was required to retain the undersigned attorneys and is required to pay a reasonable fee for their services. Mr. Zipperer is entitled to a reasonable attorneys' fee as part of the cost pursuant to Title 42 U.S.C.A Section 1988.

69. Because the City Entities failed to provide the requisite written notice reasonably calculated to apprise

Mr. Zipperer under the circumstances of the pendency of an action which materially affected his security interest in the Mortgaged Property, the liens attached to the Mortgaged Property through Parcels 8606, 8602, and 8601 for Districts 10, 15, and 17 should be subordinated as junior liens to Mr. Zipperer's purchase money mortgage and foreclosed.

70. The City Entities acting under color of state law denied Mr. Zipperer his right to due process.

WHEREFORE, Mr. Zipperer requests declaratory relief, a prioritizing of the liens, foreclosure of the District 10, 15 and 17 special assessment liens, equitable subordination of the District 10, 15 and 17 Special Assessment liens, compensatory damages, attorneys' fees, the costs of this action, and other such relief as the Court deems just, necessary, and proper.

## COUNT IV

Cause of Action Against the County Entities:
§ 1983 Action

Mr. Zipperer realleges and incorporates by reference the allegations contained in paragraphs 1 through 39 as if fully set forth herein.

71. The County Entities acting under color of state law failed to provide Mr. Zipperer with written notice reasonably calculated to apprise him of the pendency of an action which materially altered his property interest in the Mortgaged Property.

72. The Fourteenth Amendment to the United States Constitution and Article X, Section VI of the Florida

Constitution provide that no state shall deprive any person of life, liberty or property without due process of law.

73. Mr. Zipperer, as mortgagee, has a legally protected property interest and was entitled to written notice reasonably calculated under the circumstances to apprise him of the pendency of an action which would diminish the value of his security interest in the Mortgaged Property and that the special assessments would purportedly become a lien superior to Mr. Zipperer's security interest in the Mortgaged Property and that would subordinate his interest, particularly where Mr. Zipperer's security interest was easy to identify through the public records of Lee County. The Mortgage Deed's unencumbered interest and waste provisions should have put the City on notice that Mr. Zipperer's interest was a first lien and that that first lien contemplated that no diminishing in value of the security interest or subrogation of the first lien would occur, including diminished value and subrogation through the imposition of special assessment liens.

74. The Ordinance and Resolutions which the Board passed to levy special assessments on the Special District properties, including the Mortgaged Property, were adopted pursuant to the provisions of Section 125.01 Chapter 170 and Chapter 189, Florida Statutes. Section 125.01, Florida Statutes provides supplemental and alternative methods for making local improvements. Chapter 170, Florida Statutes provides supplemental and alternative methods for making local and municipal improvements. Section 170.07, Florida Statutes, provides that the governing authority, in this instance the District 10, 15 and 17 Governing Authorities, shall fix a time whereby the owners of property to be assessed, or any other

interested persons, may appear before the governing authority to be heard as to the propriety and advisability of making the improvements and the assessments. Any such improvements, however, must be for a public purpose and provide a benefit reasonably related to the amount of the assessment on the land to be assessed. Section 170.07, Florida Statutes also provides that ten (10) days notice in writing of the hearing time and place shall be given to the property owners by certified mail. Section 170.09, Florida Statutes provides the special assessment lien will be coequal with the lien of other taxes and superior to all other liens.

75. Under color of state law, the County Entities never provided Mr. Zipperer who held a mortgage and security interest in the Mortgaged Property, which was part of the property affected by the ordinance and Resolutions, with actual written notice that the County Entities intended to impose a special assessment upon the Mortgaged Property.

76. The County Entities could easily have determined Mr. Zipperer's interest as a mortgagee by conducting a title search of the properties contained within Special District. Indeed, it is required by law that the mortgagee be notified, and the mortgagee is required to join in such things as a plat that is recorded after the mortgage. See Section 177.081, Florida Statutes.

77. Mr. Zipperer was entitled to written notice reasonably calculated under the circumstances to apprise him of the pendency of the City Entities' action and to afford him the opportunity to present his objections to the action where such action affected his interest in the

Mortgaged Property. Specifically, Mr. Zipperer had an interest as the holder of a purchase money mortgage in the Mortgaged Property, which was included in Special District, to notice of the Special District special assessments and their nature.

78. As a direct and proximate result of the County Entities' failure to provide written notice, Mr. Zipperer lost a significant property interest in having his first purchase money mortgage purportedly subrogated by operation of law to the status of a junior lien, behind the Special District special assessment lien and suffered an illegal impairment and taking of his contract rights, without his prior knowledge. Furthermore, the improvements were not for a public purpose and did not provide a benefit reasonably related to the amount of the assessment on the land to be assessed. For example, District 17, which assesses the land subject to Mr. Zipperer's mortgage, has *no* frontage at all on the road that was built using the revenue from the bonds secured by the assessments.

79. As a direct and proximate result of the County Entities' failure to provide written notice, Mr. Zipperer was required to retain the undersigned attorneys and is required to pay a reasonable fee for their services. Mr. Zipperer is entitled to a reasonable attorneys' fee as part of the cost pursuant to Title 42 U.S.C.A Section 1988.

80. Because the County Entities failed to provide the requisite written notice reasonably calculated to apprise Mr. Zipperer under the circumstances of the pendency of an action which materially affected his security interest in the Mortgaged Property, the lien attached to

the Mortgaged Property through Parcels 86061 8602, and 8601 for Special District should be subordinated as junior liens to the purchase money mortgage and foreclosed.

81. The County Entities acting under color of state law denied Mr. Zipperer his right to due process as provided by the United States and Florida Constitutions.

WHEREFORE, Mr. Zipperer requests declaratory relief, a liens [sic], foreclosure of the Special District special assessment lien, equitable subordination of the Special District Special Assessment lien, compensatory damages, attorneys' fees, the costs of this action, and such other relief just, necessary, and proper.

## COUNT V

Cause of Action Against City Entities:
Illegal Taking of Mr. Zipperer's Property

Mr. Zipperer realleges and incorporates herein by reference the allegations contained in paragraphs 1 through 39 as if fully set forth herein.

82. The assessments made on the Mortgaged Property pursuant to the Resolutions entered by the City Entities constitute an illegal taking of Mr. Zipperer Is [sic] property.

83. The Fifth and Fourteenth Amendments to the United States Constitution and Article X, Section VI of the Florida Constitution provide that no state shall deprive a person of property without just compensation.

84. Mr. Zipperer has a legally protected property interest and is entitled to compensation for a regulatory taking of his interest in the Mortgaged Property.

85. The Resolutions which the City Entities passed which levied special assessments on the Mortgaged Property denied Mr. Zipperer of all economically beneficial or productive use of the Mortgaged Property and preclude alienability of the Mortgaged Property. Furthermore, those Resolutions interfered with Mr. Zipperer's distinct, reasonable investment backed expectations for his interest in the Mortgaged Property.

86. As a direct and proximate result of the City Entities' regulatory taking of Mr. Zipperer's security interest in the Mortgaged Property, Mr. Zipperer lost a significant property interest and suffered an illegal impairment and taking of his contract rights because his first purchase money mortgage was purportedly subordinated by operation of law to a junior lien, behind the District 10, 15 and 17 special assessment liens.

87. The City Entities' regulatory taking deprived Mr. Zipperer of all economically beneficial and productive use of the Mortgaged Property and interfered with Mr. Zipperer's distinct reasonable investment backed expectations for the Mortgaged Property without just compensation.

WHEREFORE, Mr. Zipperer requests declaratory relief, prioritizing of the liens, foreclosure of the District 10, 15 and 17 special assessment liens, equitable subordination of the District 10, 15 and 17 Special Assessment lien, compensatory damages, the cost of this action and

other relief as the Court deems just, necessary and proper.

## COUNT VI

### Cause of Action Against the County Entities: Illegal Taking of Mr. Zipperer's Property

Mr. Zipperer realleges and incorporates herein by reference the allegations contained in paragraphs 1 through 39 as if fully set forth herein.

88. The assessments made on the Mortgaged Property pursuant to the Ordinance and Resolutions entered by the County Entities constitute an illegal taking of Mr. Zipperer's property.

89. The Fifth and Fourteenth Amendments to the United States Constitution and Article X, Section V, of the Florida Constitution provide that no state shall deprive a person of property without just compensation.

90. Mr. Zipperer has a legally protected property interest and is entitled to compensation for a regulatory taking of his interest in the Mortgaged Property.

91. The Ordinance and Resolutions which the County Entities passed which levied a special assessment on the Mortgaged Property denied Mr. Zipperer of all economically beneficial or productive use of the Mortgaged Property and preclude alienability of the Mortgaged Property. Furthermore, those Resolutions interfered with Mr. Zipperer's distinct, reasonable investment backed expectations for his interest in the Mortgaged Property.

92. As a direct and proximate result of the County Entities' regulatory taking of Mr. Zipperer's security interest in the Mortgaged Property, Mr. Zipperer lost a significant property interest and suffered an illegal impairment and taking of his contract rights because his first purchase money mortgage was purportedly subordinated by operation of law to a junior lien, behind the Special District special assessment lien.

93. The County Entities' regulatory taking deprived Mr. Zipperer of all economically beneficial and productive use of the Mortgaged Property and interfered with Mr. Zipperer's distinct reasonable investment backed expectations for the Mortgaged Property, without just compensation.

WHEREFORE, Mr. Zipperer requests declaratory relief, a prioritizing of the liens, foreclosure of the Special District special assessment lien, equitable subordination of the Special District Special Assessment lien, compensatory damages, the cost of this action and other relief as the Court deems just, necessary and proper.

## COUNT VII

### Cause of Action Against City Entities: Breach of Common Law Duty

Mr. Zipperer realleges and incorporates by reference the allegations contained in paragraphs 1 through 39 as if fully set forth herein.

94. The City Entities had a common law duty to provide Mr. Zipperer, a Mortgagee with a legally protected property interest, with notice reasonably calculated under the circumstances to apprise him of the pendency of an action which would diminish the value his security interest in the Mortgaged Property.

95. The City Entities breached that duty by failing to conduct a title search of the District 10, 15 and 17 properties which would have revealed that Mr. Zipperer had a mortgage and security interest in the Mortgaged Property, part of those Districts, and by failing to give Mr. Zipperer the requisite notice of the pending special assessments which would affect his security interest in the Mortgaged Property.

96. As a direct and proximate result of the City Entities' failure to conduct the title search and failure to provide Mr. Zipperer with the required notice, Mr. Zipperer lost a significant property interest in having his first purchase money mortgage purportedly subordinated by operation of law to the status of a junior lien, behind the District 10, 15, and 17 special assessment liens, without his prior knowledge.

WHEREFORE, Mr. Zipperer requests declaratory relief, prioritizing of the liens, foreclosure of the District 10, 15 and 17 special assessment liens, equitable subordination of the District 10, 15 and 17 Special Assessment lien, compensatory damages, the costs of this action, and such other relief as the Court deems just, necessary, and proper.

## COUNT VIII

Cause of Action Against County Entities:
Breach of Common Law Duty

Mr. Zipperer realleges and incorporates by reference the allegations contained in paragraphs 1 through 39 as if fully set forth herein.

97. The County Entities had a common law duty to provide Mr. Zipperer, a Mortgagee with a legally protected property interest, with notice reasonably calculated under the circumstances to apprise him of the pendency of an action which would diminish the value his security interest in the Mortgaged Property.

98. The County Entities breached that duty by failing to conduct a title search of the Special District properties which would have revealed that Mr. Zipperer had a mortgage and security interest in the Mortgaged Property, part of the Special District, and failing to give Mr. Zipperer the requisite notice of the pending special assessments which would affect his security interest in the Mortgaged Property.

99. As a direct and proximate result of the County Entities' failure to conduct the title search and failure to provide Mr. Zipperer with the required notice, Mr. Zipperer lost a significant property interest in having his first purchase money mortgage purportedly subrogated by operation of law to the status of a junior lien, behind the Special District special assessment lien, without his prior knowledge.

WHEREFORE, Mr. Zipperer requests declaratory relief, a prioritizing of the liens, foreclosure of the Special

District assessment lien, equitable subordination of the Special District Special Assessment lien, compensatory damages, the costs of this action, and such other relief as the Court deems just, necessary and proper.

## COUNT IX

Cause of Action Against City Entities:
Illegal Use of Funds

Mr. Zipperer realleges and incorporates by reference the allegations contained in paragraphs 1 through 39 as if fully set forth herein.

100. On information and belief, the City Entities reimbursed DeSimone for expenses incurred in obtaining a Development of Regional Impact ("DRI") Development order, Resolution Nos. 88-28 and 90-46.

101. DeSimone requested that the City Entities establish special assessment districts to provide a means for financing public improvements on the property known as Omni Interstate Park, which includes the Mortgaged Property.

102. The special assessment districts were implemented through the Resolutions for Districts 10, 15, and 17.

103. The City Entities agreed to reimburse and did reimburse DeSimone for the costs related to the public improvements including obtaining the DRI Development Order.

104. It is not necessary to obtain a DRI Development Order to provide the public improvements made pursuant to Districts 10, 15 and 17.

105. The infrastructure and public improvements made to Districts 10, 15 and 17 are not included in any statutory DRI category or threshold but are a necessary and fundamental component of all development projects.

106. Districts 10, 15 and 17 were created pursuant to Chapter 170, Florida Statutes. Special assessments for districts created under Chapter 170 may be levied only for the purposes enumerated in Section 170.01, Florida Statutes. These purposes do not include obtaining a DRI Development Order. Only costs necessary and incident to the improvements in the special assessment district may be reimbursed. Because the DRI Development Order is not necessary or incident to the improvements, it is not a reimbursable cost. The City Entities' reimbursement of DeSimone for these costs was illegal.

107. Article VII, Section X of the Florida Constitution prohibits the expenditure of public funds for a private purpose. Reimbursing costs which are not necessary or incident to improvements made in a special assessment district, such as DRI costs, are a prohibited expenditure of public funds for a private purpose. The City Entities' reimbursement of DeSimone for these costs was illegal.

108. Special assessments constitute a peculiar form of taxation and are levied under the taxing power of the state which is limited by Article VII, Section I of the Florida Constitution which therefore limits the City Entities' powers of taxation in Districts 10, 15 and 17 to only

those permissible taxes. The City Entities' taxing through Districts 10, 15 and 17 for the DRI costs were not within their permissible taxing powers and was illegal.

109. Because the City Entities reimbursed DeSimone for DRI expenses which are not necessary and incident to the District 10, 15 and 17 improvements, expended public funds for a private purpose and taxed outside their permissible taxing powers, the City Entities have illegally used special assessment funds which were obtained by assessing the Mortgaged Property and illegally taken Mr. Zipperer's property interest by purportedly subordinating those interests to a lien based on an illegal expenditure of funds.

WHEREFORE, Mr. Zipperer requests compensatory damages, the cost of this action and all other relief the Court deems just, necessary and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express to Jacqueline W. Hubbard, Esquire, City Attorney, P.O. Drawer 2217, Ft. Myers, Florida 33902; Theodore L. Tripp, Jr., Esquire, Garvin & Tripp, P.O. Drawer 2040, Ft. Myers, Florida 33902; John S. Turner, Esquire, Lee County Attorney, P.O. Box 398, Ft. Myers, Florida 33902-0398, and Kathleen E. Moore, Assistant Attorney General, The

Capitol – Suite PL-01, Tallahassee, Florida 32399-1050, on this 27th day of October.

/s/ John H. Rains III
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